



# CITY OF HAYWARD AGENDA REPORT

AGENDA DATE 09/22/98

AGENDA ITEM \_\_\_\_\_

WORK SESSION ITEM WS#2

**TO:** Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** BROWN ACT BRIEFING

## **Recommendation:**

It is recommended that the City Council review and comment upon the following information.

## **Introduction:**

In keeping with the City's strong commitment to the principles of open government, as well as the Alameda County Grand Jury's recommendation for periodic Brown Act updates, this report is presented to apprise the Council of recent Brown Act issues and amendments.

## **Discussion:**

The Ralph M. Brown Act ("Brown Act") is California's "sunshine" law for local governments. Based upon a state policy that the people must be informed so that they can maintain oversight of the government, it requires that all meetings of the legislative body of a local agency be open and public, and that all persons be permitted to attend any meeting of the legislative body of a local agency, unless an exception exists.

The Brown Act is organized into three main components dealing with which local bodies are covered by the Act, what constitutes a meeting under the Act, and Agenda and Public Records concerns. Because City Council members are familiar with these components, and are well-versed on basic Brown Act requirements, this report will not go into detail on these fundamentals. Rather, it will focus on recent Brown Act amendments and local issues.

## **1997 Brown Act Amendments**

Several 1997 amendments to the Brown Act became effective January 1, 1998. The City Attorney gave Council members a briefing on these changes at that time. The significant changes are discussed below.

### **Meetings**

*New Exemptions.* Since **1994**, the Brown Act has allowed a majority of a legislative body to attend a meeting of another legislative body, provided there are no “sidebar” discussions about specific city business. The 1997 amendments clarify this provision and provide that the majority can speak as part of the scheduled meeting, again provided there are no sidebar discussions about city business. An example of this would be a Council majority appearing to testify on an issue in a neighboring city.

The 1997 amendments also now explicitly permit a majority to attend a standing committee meeting, but only as “observers.” Being an “observer” will probably be construed to mean sitting in the audience and not responding to questions or otherwise participating.

*Setting Meeting Time and Place.* The 1997 amendments exempt advisory committees and standing committees from the requirement of taking formal action to establish a time and place for holding regular meetings. This change will reduce the administrative burden and inconvenience associated with staff support for advisory committees.

### **Teleconferencing**

The 1997 amendments have finally made electronic, remote meetings a real possibility. Under the former law, “video teleconferencing” was the only way to allow people to participate in a meeting from remote locations. But members of the legislative body could not participate, be counted as part of the quorum, or vote from remote locations.

The 1997 amendments allow “teleconferencing” to be used as a method for conducting electronic meetings. Council members may be counted toward a quorum and participate fully in the meeting from remote locations. There are several technical requirements, including:

- Any remote location may be connected to the main meeting location by telephone, video or both.
- The notice and agenda of the meeting must identify any remote locations.
- Any remote locations must be posted and accessible to the public.
- All votes must be made by roll call.

- The meeting must in all respects comply with the Brown Act, including enabling participation by members of the public present in remote locations.

The 1997 amendments leave open the question whether all of the participants in the meeting must be physically present within the jurisdiction. On the one hand, the Brown Act requires all meetings to be within the agency's jurisdiction (save for a few specific exceptions). On the other hand, it may be argued that a "meeting" takes place where a quorum is present so that less than a quorum could participate electronically from outside the jurisdiction. This new allowance for teleconferencing will be especially useful to joint powers agencies, where attendance at meetings may be time-consuming and expensive.

### *Adding Items To An Agenda*

The 1997 Brown Act amendments liberalized former law on adding "urgency" items to the agenda. The old law required a two-thirds vote of the total voting membership, or a unanimous vote if less than two-thirds of the Council was present (assuming the Council finds an immediate need to take action on an item and the item came to the agency's attention after the agenda was posted).

The 1997 amendments reduce the vote requirement by allowing a vote of two-thirds of those present, or by unanimous vote if less than two-thirds of members are present. This means that if five members of a seven-member body are present, three votes are required to add the item; if only four are present, a unanimous vote is required.

### *Mailing Of Agenda Materials*

Formerly the Brown Act required the City to mail notice of regular and special meetings upon request at least one week before the meeting. This provision was virtually useless in light of agenda requirements and the public's actual interest in the agenda and packet materials.

The 1997 amendments require the City to mail the agenda or the full packet to any person making a written request no later than the time the agenda is posted or is delivered to the members of the body, whichever is earlier. The city may charge fees to recover its copying and mailing expense. Any person may make a permanent request to receive these materials, in which event the request must be renewed annually. Failure to receive the agenda does not constitute grounds to invalidate any action taken at a meeting.

### *Notice of Special Meetings*

The former law required mail or personal delivery of special meeting notice to each council member. The 1997 amendments allow special meeting notice to be given by "any means," which at a minimum includes fax and e-mail transmission in addition to mailing and personal delivery, as

long as it is received 24 hours prior to the meeting.

### **Issues of Local Concern**

There have been some questions raised recently over the balance between the public's right to speak during the public comment section of meetings and basic rules of decorum. Questions have arisen in situations when a member of the public refuses to abide by standard decorum and becomes unruly or uses the public comments section as a forum to personally attack city staff or officials.

Under the Brown Act, the public has a right to address the city council at any meeting on any topic that is within the council's subject matter jurisdiction. (Gov. Code, §54954.3.) The right to express one's views in a public place is fundamental to a free society; however, it is not absolute and is subject to valid regulations. As a branch of the government, the city council has a need and right to manage speech within its institutions. The California Attorney General has concluded that a city council meeting is a "limited public forum." (78 Cal.Op.Att'y Gen. 224 (1995).) Accordingly, City councils have authority to limit speech through the imposition of agendas and rules of order and decorum. However, the regulations on public comment must be reasonable. (*Madison Joint School Dist. v. Wisconsin Employment Relations Commission* (1976) 429 U.S. 167; *White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421; *Kindt v. Santa Monica Rent Control Board* (9th Cir. 1995) 67 F.3d 266.) Any restrictions upon public comment at council meetings must not be too broad and must not constitute prior restraints. A city council may prohibit a member of the public from speaking on a matter which is not within the council's subject matter jurisdictions. ( 78 Cal.Op.Att'y Gen. 224 (1995)) Some other forms of permissible regulation are as follows:

- Request to Speak Requirements: A city council may require members of the public wishing to address the city council to fill out a speaker's card and submit it to the city clerk.*White v. City of Norwalk* (9th Cir. 1990) 900F.2d 1421
- Time Limits: A city council may regulate the total amount of time on particular issues and for each individual speaker, subject to the requirements of due process. Time limits of one to five minutes are not unusual for individual speakers.
- Repetitious or Irrelevant Comments: Irrespective of any time limits, the city council may regulate a speaker who is speaking too long by being unduly repetitious or by extended discussion of irrelevancies. A moderator is vested with a great deal of discretion to determine at which point speech becomes unduly repetitious or irrelevant. Attacks against the character or motive of any person may be ruled out of order. *White v. City of Norwalk* (9th Cir. 1990) 900F.2d 1421
- Spokesperson for Groups: The right to limit testimony on a given subject implies the right to request a spokesperson be chosen for a group and/or limit the number of such persons addressing the council whenever a group of persons wishes to address the council on the

same subject matter. Gov. Code, § 54954.3.

- **Enforcement:** City councils may rule speakers out-of-order for cause. A speaker may not be ruled out-of-order, however, due to the substance of the comments, unless they are irrelevant to the subject at hand, beyond the subject matter jurisdiction of the council and/or unduly repetitious. *white v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421 . In Hayward, the Mayor had been designated as the Presiding Officer and is charged with assuring the orderly conduct of meetings.

Pursuant to these principles, the City Council has promulgated certain regulations, found in the council members handbook, to assure for the orderly conduct of meetings. These regulations provide that members of the public attending council meetings must observe the same rules of order and decorum applicable to council members. These include addressing all comments to the Chair of the meeting, not interrupting while another person is speaking, following any ruling the Chair may make regarding points of order in the proceedings, and according the utmost courtesy to the Council, city employees and other members of the public who may be appearing before council. Attendees shall refrain at all times from rude and derogatory remarks, reflections as to integrity, abusive comments and statements as to motives and personalities.

In addition, Council has adopted time limitations of three (3) minutes for individual speakers and five (5) minutes for individuals representing a group or agency. Such time limitations have consistently been held to be appropriate by the courts.

### **Related Issues**

**Discussing Items Not On The Agenda:** While the Brown Act generally prohibits acting on or discussing items not on the posted agenda, it allows the Council to do any of the following:

- Briefly respond to statements made or questions posed by persons exercising their public testimony rights.
- Ask a question for clarification.
- Make a brief announcement.
- Make a brief report on his or her own activities.
- Provide a reference to staff for factual information.
- Request staff to report back to the Council on any matter.
- Take action to direct staff to place a matter of business on a future agenda.

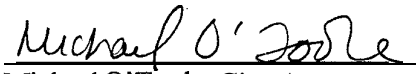
While neither the legislature nor the courts have provided guidance on what a “brief”

statement, comment, announcement or report may be, discretion would seem to dictate that they be able to be completed within one minute.

*Suspension of Council Rules:* Pursuant to the provisions of the Council Handbook, the Presiding Officer (the Mayor or Mayor Pro Tern.) is required to decide all questions of interpretations of the rules, points of order or questions of procedure unless overridden or suspended by a majority vote of the Council Members present and voting. Thus, if a member of Council wishes to suspend a particular rule (e.g. time limitations), a motion should be made and voted upon by the Council.

*Discussion of Agenda Items Prior to Public Comment:* Pursuant to the provisions of the Brown Act, the public is afforded an opportunity to speak on virtually any item on the agenda prior to its being acted upon by the Council. Hence, it would be appropriate for members of the public to be afforded the opportunity to present evidence and testimony on an item prior to members of the Council discussing their concerns, opinions and positions.

**Recommended by:**

  
Michael O'Toole, City Attorney

**Approved by:**

  
Jesus Armas, City Manager